

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

JEMAR E.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2012070720

**DECISION**

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on August 13, 2012, in Napa, California.

Kristen Casey, Attorney at Law, represented North Bay Regional Center, the service agency.

Claimant Jemar E. was present and represented by his mother, Rhenae K.

The matter was submitted for decision on August 13, 2012.

**ISSUE PRESENTED**

Is claimant eligible to receive services from the North Bay Regional Center because he suffers from a disabling condition closely related to mental retardation, or requires treatment similar to that required for individuals with mental retardation?

**FACTUAL FINDINGS**

*Introduction*

1. Claimant is a 24-year-old adult who applied for services from the Regional Center of the East Bay (RCEB) in 2009. RCEB concluded that claimant did not have a

developmental disability and was therefore not eligible for regional center services. Claimant filed a request for a fair hearing under the Lanterman Act,<sup>1</sup> and after an administrative hearing, a decision was rendered on November 17, 2009, affirming the denial of eligibility.

2. Claimant later moved to Vacaville, and made another application for services to his local service agency, the North Bay Regional Center (NBRC). NBRC refused to accept claimant's application in light of the previous decision that claimant was ineligible for services.

3. On July 11, 2012, claimant filed a fair hearing request regarding NBRC's refusal to accept his application or provide him with services. This hearing followed.

#### *2009 Decision*

4. Claimant was 21 years old at the time of the November 2009 hearing. He submitted numerous documents, including an in-depth psychological evaluation prepared on April 13, 2009, in which claimant was diagnosed with Schizoaffective Disorder-Bipolar Type, Cognitive Disorder-Not Otherwise Specified, Cannabis Dependence, Attention Deficit Hyperactivity Disorder and a Learning Disorder-Not Otherwise Specified. The evaluator found claimant to have cognitive impairments in executive functioning, memory and visual-spatial processing. Claimant's full scale intelligence quotient (IQ) was determined to be 82.

5. At hearing, RCEB provided testimony from Jan Garvey, M.D., and Myles Friedland, Ph.D., both of whom had reviewed all documents submitted by claimant, as well as a report from a clinical psychologist who had evaluated claimant at RCEB's request. Drs. Garvey and Friedland determined that claimant suffered from learning disorders and behavioral problems rather than a developmental disability.

6. The administrative law judge considered the testimony and documentary evidence provided by both parties at hearing, and decided that the weight of the evidence supported the conclusion that claimant's challenges pertained to learning disorders and psychiatric/behavioral impairments rather than a developmental disability. As a result, claimant was found ineligible for regional center services. Claimant did not appeal the decision.

7. Claimant now argues that the administrative law judge failed to consider both prongs of the so-called "fifth category" of eligibility. The "fifth category" provides regional center services to individuals suffering from "disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).) The administrative law judge referred to both prongs of the "fifth category" in his decision. In any event, no appeal to the

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<sup>1</sup> Welfare and Institutions Code, section 4500 et seq.

November 17, 2009 decision was filed within 90 days, therefore, that administrative decision is now final and cannot be relitigated.

### *New Evidence*

8. Over the objection of NBRC, claimant was permitted to submit evidence obtained following the last hearing, in order to determine whether a condition that existed before he turned 18 years of age, had been discovered which would render him eligible for regional center services. As a result, this evidence was considered by the regional center and the parties requested a decision on claimant's eligibility for regional center services.

9. Claimant submitted a psychological evaluation performed in 2011, by Janet S. Cain, Ph.D. Dr. Cain met with claimant on June 29, 2011, October 24, 2011, November 11, 2011, and November 30, 2011. Dr. Cain administered the WAIS-IV<sup>2</sup> and found claimant to have a full scale IQ of 88. Dr. Cain found that claimant's intellectual abilities fall within the low average range of measured intellectual deficit, but that he exhibits significant delays in adaptive behavior, his independent living skills are significantly impaired, he will need assistance in all activities of daily living, he requires vocational training, and has significant deficits in living skills, self-direction and economic self-sufficiency.

10. A letter dated May 17, 2011, from clinical psychologist Andrew Fisher, Ph.D., who had seen claimant in psychotherapy for two months, was also provided. Based on his observations of claimant, and the results of the April 13, 2009 evaluation referred to in Factual Finding 4, Dr. Fisher opined that without comprehensive guidance, claimant will fall short of achieving the goal of independent living.

11. Claimant submitted a letter dated December 22, 2010, from Marsha Alexander, M.D. Dr. Alexander stated that claimant suffers from multiple medical and psychiatric diagnoses and limited intelligence. Dr. Alexander reported that claimant has significant difficulties managing his personal affairs and basic hygiene.

12. Claimant provided a letter from Sharon A. Bender, L.C.S.W., dated November 30, 2010. Bender assists the family with developing coping skills for the emotional distress caused by what she calls claimant's "Executive Function Disorder."

13. Claimant submitted letters from Javed Iqbal, M.D., a staff psychiatrist at the Solano County Adult Mental Health Outpatient Clinic, dated September 28 and November 29, 2010. Dr. Iqbal provided claimant with mental health treatment beginning in June 2010. Dr. Iqbal points to the April 13, 2009 evaluation, for information about claimant's condition.

14. Claimant's mother and sister testified to the challenges they experience at home with claimant. Claimant has difficulty completing household chores, seems unaware

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<sup>2</sup> Wechsler Adult Intelligence Scale – Fourth Edition.

of potential safety hazards, has temper tantrums, refuses to listen to his mother and sister, and does not respond to them in an age appropriate manner.

### *NBRC Evidence*

15. Todd Payne, Psy.D., a licensed psychologist, who has worked at NBRC for nine years and has performed regional center eligibility evaluations for eight years, evaluated claimant's new request for services. Dr. Payne reviewed the 2009 decision denying eligibility, the underlying evidence, and the new evidence provided by claimant.

After reviewing claimant's file, Dr. Payne concluded that claimant is ineligible for regional center services. Claimant's IQ was determined to be 82 at the time of the previous hearing, and was calculated as 88 in claimant's new report.<sup>3</sup> In Dr. Payne's view, an individual with an IQ at that level does not suffer from a condition similar to mental retardation and does not require treatment similar to that required by individuals with mental retardation. Although on rare occasion, an individual with an IQ above 75 will be eligible for services under the "fifth category" based upon an extraordinary condition, such as a traumatic brain injury, nothing in claimant's records indicates that he requires treatment similar to that required by individuals with mental retardation. Nor is there evidence that claimant suffers from cerebral palsy, epilepsy or autism.

### *Conclusion*

16. None of the new expert reports or letters submitted by claimant establishes that claimant suffers from a disabling condition closely related to mental retardation, or that he requires treatment similar to that required by individuals with mental retardation.

17. None of the new information provided by claimant provides a basis for eligibility for regional center services.

## LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. A developmental disability is defined in the Lanterman Act as a "disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes as substantial disability for that individual." (Welf. & Inst. Code, § 4512, subd. (a).) The term "developmental disability" includes mental retardation, cerebral palsy, epilepsy, autism or what is commonly referred to as the "fifth category." (Welf. & Inst. Code, § 4512, subd.

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<sup>3</sup> An individual with an IQ of 70 or below is considered to suffer from mental retardation. An IQ between 70 and 75 is considered to be borderline, which may lead to regional center services under the fifth category.

(a.). Claimant does not suffer from mental retardation, cerebral palsy, epilepsy or autism. (Factual Finding 15.)

2. The “fifth category” includes “disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.” (Welf. & Inst. Code, § 4512, subd. (a).) Thus, the “fifth category” includes individuals whose IQ scores do not fall squarely within the range of mental retardation, but whose cognitive and/or social functioning is similar to mentally retarded individuals. The regulations implementing this section of the Lanterman Act provide that conditions that are solely physical in nature, or consist solely of learning disabilities are not considered developmental disabilities under the Act. (Cal. Code Regs., tit. 17, § 54000, subd. (c).)

3. Claimant has been diagnosed with Schizoaffective Disorder-Bipolar Type, Cognitive Disorder-Not Otherwise Specified, Cannabis Dependence, Attention Deficit Hyperactivity Disorder and a Learning Disorder-Not Otherwise Specified, and exhibits some cognitive and executive functioning impairment. Claimant’s new evidence does not establish that he suffers from a condition similar to mental retardation, or a condition requiring treatment similar to that required by an individual with mental retardation. (Factual Findings 4, 9 through 17.) Without such evidence, claimant’s appeal must be denied.

### ORDER

The appeal of claimant Jemar E., from North Bay Regional Center’s refusal to provide services, is denied.

DATED: \_\_\_\_\_

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JILL SCHLICHTMANN  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.